Petition

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

PAUL BERNSTEIN,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

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QUESTION PRESENTED FOR REVIEW

When a plaintiff's complaint is dismissed on the eve of trial, as a sanction for plaintiff's attorney allegedly failing to respect a last minute discovery obligation to answer certain interrogatories, and there is no wilfulness by either the attorney or the party, and a new complaint is then filed in which it is alleged that the dismissal in the initial action was not predicated upon the basis that plaintiff had wilfully refused to provide further answers to interrogatories, is the dismissal of this second action on the grounds of res judicata a denial to plaintiff of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution?

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PAUL BERNSTEIN,

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v:

ALLSTATE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Paul Bernstein, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the California Court of Appeal.

OPINION BELOW

The Opinion of the Court of Appeal is reported at 119 Cal.App.3d 449 and is printed in Appendix A, infra, pp. A-1 through A-6, inclusive.

JURISDICTION

The Opinion of the Court of Appeal (Appendix A, infra, pp. A-1 through A-6, inclusive) was filed and entered on May 22, 1981. A timely Petition for Rehearing was made and denied on June 11, 1981. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment to the United States Constitution as it relates to §2034 of

the California Code of Civil Procedure which authorizes the Dismissal of a lawsuit where a party or his agent refuses to obey an order of discovery. Section 2034 of the California Code of Civil Procedure is set out verbatim in Appendix B, and the portion relevant to the proceedings herein is underlined.

STATEMENT OF MATERIAL FACTS

Plaintiff filed in the Superior Court of the County of Los Angeles a two count complaint entitled Complaint against Insurance Company for Declaratory Relief, Bad Faith, and Refusal to Pay Benefits and for Punitive Damages. Defendant demurred to the complaint, and the court sustained the demurrer without leave to amend. Thereupon, an Order of Dismissal was entered. The Court of

Appeal affirmed the judgment of dismissal. A Petition for Rehearing was denied. A Petition for Hearing was filed in the California Supreme Court and was denied on July 15, 1981. The Remittitur issued on July 22, 1981.

Defendants issued to plaintiff a policy of insurance which contained certain definitions of non-owned automobile, and which contained certain guarantees of renewability. Thereafter defendant issued a new policy which redefined non-owned automobile. Following the issuance of the new policy, plaintiff became involved in an automobile accident while driving an automobile which he did not own. Plaintiff was covered for the accident under the definition of non-owned automobile in the first policy, but was not covered

under the definition in the second policy. Plaintiff demanded that defendants tender a defense to him and pay whatever liability he might have, but defendants failed and refused to tender any defense or pay his liability. The lawsuit which plaintiff brought as against defendants was dismissed in May of 1976 after the Superior Court entered an Order of Dismissal on the ground that Plaintiff's attorney had failed to provide further answers to certain interrogatories.

Plaintiff brought this action, and in addition to alleging the operative facts of the first action alleged that an Order of Dismissal was entered in the first action on the ground that plaintiff's attorney had failed to provide further answers to certain interrogatories. Plaintiff additionally alleged

that no finding was ever made, nor was the dismissal predicated upon the basis that plaintiff had wilfully refused to provide further answers to interrogatories.

Plaintiff additionally alleged:

> "To dismiss plaintiff's complaint, and to deny plaintiff the opportunity to proceed at this time would be to deny plaintiff property without due process of law in violation of the Fourteenth Amendment to the United States Constitution."

FEDERAL QUESTION RAISED

Plaintiff first raised in his complaint the question of the state action depriving him of due process in violation of the Fourteenth Amendment to the

United States Constitution. The question of his rights under the Federal Constitution was again raised in the Court of Appeal. The Court of Appeal ignored the question of petitioner's rights under the Federal Constitution, and the point was raised in a Petition for Rehearing:

> "Concededly there may be a situation where a party is to be punished by losing his right to a trial. But the complaint has raised the question of a federal constitutional right. The right to have adjudicated in a court of law one's complaint against another. That is one of the most precious freedoms one has under our constitution. That is one of the most basic ways by which one

can distinguish a free society from a totalitarian society. The federal courts have recognized that before one may have his cause of action dismissed, it must be an extreme situation."

The Court of Appeal again ignored the federal question which was raised.

Petitioner again raised the question of his due process rights in his Petition for Hearing in the California Supreme Court which petition was denied.

ARGUMENT

The California Court of Appeal, and the California Supreme Court by the denial of petitioner's Petition for Hearing in the California Supreme Court, has decided a federal question of

substance not in accordance with decisions of the Ninth Circuit and this Court. Essentially, the California Court of Appeal has taken the position that one may be denied a cause of action on the mere failure to obey a discovery order even though the disobedience was not wilful.

Rule 37 of the Federal Rules of Civil Procedure is substantially similar to California Code of Civil Procedure §2034. Both Rule 37 and §2034 of the California Code of Civil Procedure establish that if a party fails to obey a discovery order of the court, sanctions, including dismissal, may be imposed. Rule 37 has been interpreted by the federal courts to require not only wilful conduct, but conduct which was continuous and blatant. **Chism v.**

National Heritage Life Insurance Co. 637 F.2d 1328 (9th Cir., 1981). It must be an extreme situation. **Raiford v. Pounds** 640 F.2d 944 (9th Cir., 1981).

The California Court of Appeal has also interpreted Rule 37 to require wilfulness, and bad faith. **Kahn v. Kahn** 68 Cal.App.3d 372.

The right to have adjudicated in a court of law one's complaint against another is one of the most precious freedoms one has under our Constitution. It is a right which holds a society together. If large groups in a society felt there was no effective way to reach the courts to seek redress of a problem, that society could not long endure. To arbitrarily deny one his right to have a cause of action determined on the merits is a denial of due

process. See generally **Annotation**, 99 L.Ed. 54, **Annotation**, 4 ALR2d 370.

The state courts have ignored the question raised by petitioner that his initial action was dismissed as against him without any wilful conduct having been committed by him or anyone on his behalf. There never has been a finding that petitioner, or anyone on his behalf, committed any wilful violation of any discovery order. In this posture, to deny petitioner the right to have that adjudication made, as a question of fact, is to deny him due process of law. To afford petitioner that right is not to overburden the judicial system in any way. The trial court, in the exercise of its discretion, can have the issue of petitioner's wilfulness, or lack of wilfulness, separately tried.

If there is no substantial issue as to whether or not petitioner wilfully disobeyed the court's order, the issue may even be resolved on a Motion for Summary Judgment.

The issue here is an extremely important one. It is whether or not the legitimate expectation of a person to have his complaint as against a major corporate defendant tried can be fulfilled or not. To deny petitioner that right is to strike at the very foundation of a scheme of ordered liberty.

Respectfully submitted,

DAVID S. SPERBER

Attorney for Petitioner

APPENDIX "A"

CERTIFIED FOR PUBLICATION
FILED: May 22, 1981
CLAY ROBBINS, JR., CLERK

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PAUL BERNSTEIN,
Plaintiff and Appellant,

vs.

ALLSTATE INSURANCE COMPANY,

Defendant and Respondent.

2d Civ. No. 61291

(Super.Ct.No. C318627)

APPEAL from an order of the Superior Court of Los Angeles County. Leon Savitch, Judge. Affirmed. David S. Sperber, for Plaintiff and Appellant.

Lynberg & Nelsen, and Judith Gold, for Defendant and Respondent.

Appeal from order of dismissal of plaintiff's complaint on the ground of res judicata. Affirmed.

BACKGROUND:

In May 1976, plaintiff filed an action against defendant (Case No. C-159619) for its failure to tender a defense or to pay the amount of damages for which plaintiff was held liable following an automobile collision involving an automobile not owned by plaintiff and driven by him without the owner's permission. Plaintiff had sought recovery under an automobile insurance policy issued to him by defendant. In February 1978, the trial court ordered dismissed the complaint based on willful failure to furnish answers to certain interrogatories propounded by

defendant, as ordered by the court. On appeal, this court (Div. Five) affirmed the order of dismissal.

Thereafter, in April 1980, plaintiff again sued defendant (Case No. C-318627), making basically the same allegations as those contained in the original complaint. Ihe trial court sustained defendant's demurrer, without leave to amend, on the ground that the judgment in the original action was res judicata as to all issues in the second action. This appeal by plaintiff followed.

ISSUE ON APPEAL:

The only issue before us is whether the dismissal of the first action for

willful failure to comply with the discovery order barred the subsequent action.

DISCUSSION:

A dismissal for failure to obey a court's discovery orders has the effect of a judgment on the merits against a plaintiff. (Kahn v. Kahn (1977) 68 Cal.App.3d 372, 383.) As the court stated in Kahn, '[T]he persistent refusal of a party to make discovery results in a presumption, as a matter of law, that the asserted causes of action are without merit.' (Ibid.)

With respect to plaintiff's argument that the dismissal of his complaint against defendant was based on the willful failure of plaintiff's attorney, not plaintiff himself, to comply with the

court-ordered discovery, it should be borne in mind that plaintiff "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." (Link v. Wabash Railroad Co. (1962) 370 U.S. 626, 633-634.) Any other notion would be totally inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent (Id. at p. 634), and would allow litigants or their counsel to turn a deaf ear to the processes of the court with impunity, thus precluding effective judicial administration at the trial court level (Kahn v. Kahn, supra, at p. 383).

The order of dismissal in Case No. C-318627, the subject of the present appeal, is affirmed.

CERTIFIED FOR PUBLICATION.

/s/BEACH, J.

BEACH

We concur:

/s/ROTH, P. J.

ROTH

/s/FLEMING, P. J.

FLEMING

APPENDIX "B"

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 2034. Refusal to make discovery; consequences

Refusal to answer; order compelling answer or production of book or thing

(a) If a party or other deponent refuses or fails to answer any question propounded upon examination during the taking of a deposition, or refuses or fails to produce at a deposition any books, documents or other things under his control pursuant to a subpoena duces tecum, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Such proponent, on notice of all persons affected thereby, may move the

court in which the action is pending (if the deponent is a party or otherwise subject to the jurisdiction of such court), or if such court does not have jurisdiction over the deponent, to the superior court of the county in which the deposition is taken for an order compelling an answer or if good cause is shown, the production of such book, document, or other thing. Such motion may also be made, without further notice, if the proponent notifies the refusing party or other deponent at the time of such refusal or failure that the proponent will apply to the court for an order pursuant to this subdivision of this section, at a specified time not less than 10 nor more than 30 days from the date of such refusal or failure, in which event the officer before whom the

deposition is taken shall direct the refusing or failing party or other deponent to attend a session of said court at said time. Not less than five days prior to the hearing on any such motion, the proponent must lodge with the court the original transcript of such deposition. Upon the refusal or failure of a party to answer any interrogatory submitted under Section 2030 of this code, the proponent of the question may on like notice make like application for such an order. Upon the filing and service of either written objections to a request under Section 2033, or an answer deemed by the requesting party not to be in compliance with the requirements of Section 2033, the party serving such request may on like notice make like application for an

order requiring answers or further answers to such request. If the motion is granted the court shall order that an answer or further answer be served within an appropriate time. Upon the refusal or failure of a party to identify documents, papers, books, accounts, letters, photographs, objects, or tangible things or to permit inspection or entry after having been served with a request under Section 2031 of this code, the party serving such request may on application for an order to compel compliance with the request. If the court finds that the refusal or failure or objection was without substantial justification or that the answer does not comply with the requirements of Section 2033, the court may require the refusing or failing or

objecting party or deponent and the party or attorney advising the refusal or failure or objection or any of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court may require the examining party or the attorney advising the motion or both of them to pay to the refusing or failing or objecting party or witness the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees.

If the court orders that an answer or further answer to requests for admissions be made, and such answer or

further answer is not filed and served within the period ordered by the court, each of the matters involved in such order shall be deemed admitted, subject only to relief pursuant to Section 473, as restricted by the provisions of Section 2033.

Contempt: other consequences

(b)(1) The court may punish as a contempt (i) the refusal of any person to obey a subpoena issued by that court to attend a deposition or to be sworn as a witness, or (ii) the refusal of any person to attend a session of court (either personally or by his attorney) after having been directed to attend in the manner provided in subdivision (a) of this section, or (iii) the refusal of any person to obey any order made by the

court under subdivision (a) of this section.

(2) If any party or person for whose immediate benefit the action or proceeding is prosecuted or defended, or an officer, director, superintendent, member, agent, employee or managing agent of any such party or person refuses to obey an order made under subdivision (a) of this section, or if any party or an officer or managing agent of a party refuses to obey an order made under Section 2019, 2031 or 2032 of this code, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description

of the thing or land, or the contents of the paper, or the physical or mental or blood condition of the person sought to be examined, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of the physical or mental or blood condition of the person sought to be examined;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed,

or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) An order requiring the disobedient party or the attorney advising such disobedience to pay to the party obtaining an order under this section the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees;

(v) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental or blood examination;

(vi) Where a party has failed to comply with an order under subdivision

(a) of Section 2032 of this code requiring him to produce another for examination, such orders as are listed in (i), (ii), and (iii) of this subdivision of this section, unless the party failing to comply shows that he is unable to produce such person for examination.

Expenses on refusal to admit

(c) If a party, after being served with a request under Section 2033 of this code to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court in the same action

for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. If the court finds that there were no good reasons for the denial and that the admissions sought were of substantial importance, the order shall be made.

Failure to appear or serve answers

(d) If a party or a person for whose immediate benefit the action or proceeding is prosecuted or defended or anyone who at the time the deposition is set is an officer, director, or managing agent of any such party or person willfully fails to appear before the officer who is to take his deposition, after said party or his attorney has been served with a proper notice in

accordance with the provision of subdivision (a)(4) of Section 2019 of this code, or if a party or an officer or managing agent of a party willfully fails to serve answers to interrogatories submitted under Section 2030 of this code, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party, or impose such other penalties of a lesser nature as the court may deem just, and may order that party or his attorney to pay to the moving party the reasonable expenses in making such motion, including reasonable attorney's fees.